Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,

Appellant,

vs.

DAVID H. BLAIR,
Commissioner of Internal Revenue, *et al.*

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

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Edward and John Burke, Limited,
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Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a decree of the lower court, dismissing for want of equity the complainant's bill which sought to enjoin the prohibition enforcement officers from interfering with the sale by complainant for medicinal purposes of a quantity of Guinness's Stout, lawfully acquired by it prior to the National Prohibition Act and now and then lawfully held by it, and also from interfering with the right of complainant to continue to carry on its business of importing and selling Guinness's Stout for medicinal purposes.

The basis of the complaint was the averment that the Act of Congress approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, and the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for the enforcement of said Acts, are unconstitutional and void, in so far as they prohibit the purchase, sale and use of Guinness's Stout for medicinal purposes. That portion of the Willis-Campbell Act alleged to be unconstitutional and void is as follows:

> That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void.

Complainant's main contention is that while the Eighteenth Amendment has given Congress the power to prohibit the manufacture, sale and transportation of intoxicating liquor for *beverage* purposes, the power to permit, regulate or prohibit the use of intoxicating liquor for *non-beverage* purposes has been reserved to the several States; that while Congress possesses the incidental power to impose regulations upon the manufacture, sale and transportation of non-beverage liquor, so far as reasonably necessary to make effective its control over beverage liquor, such power is limited to reasonable regulation, and must stop short of the complete prohibition of the use of malt liquor for medicinal purposes, sought to be effected by the Willis-Campbell Act; and that the quoted portion of the Act is an unlawful and ineffectual effort on the part of Congress to exercise a legislative power which does not belong to it.

The allegations of the bill with respect to the medicinal character and use of Guinness's Stout, which for

the purposes of this appeal are to be taken as true, are set forth in paragraph VI of the bill (R. 3) in the following language:

> "Guinness's Stout, as imported into this country and as heretofore sold by complainant, consists solely of pale malt, hops, and a certain amount of roast malt or barley, with the addition of water. Its alcoholic content, by volume, is from seven to eight per cent. Complainant is informed and believes and therefore alleges that its use in England and foreign countries, and also in the United States during the period in which its sale was permitted, is largely and predominatingly for medicinal purposes; and that its use in this country for beverage purposes was slight and negligible in comparison with its use as a medicine and for general non-beverage purposes. Complainant and its predecessor for many years habitually advertised its Guinness's Stout to the trade as a valuable medicinal agent in pulmonary troubles, as useful for nursing mothers, in convalescent cases, for persons in a low or run-down state of health, etc. Over fifty per cent of the sales of Guinness's Stout made by complainant and its predecessor in the United States were made directly to wholesale druggists and grocers in New York, Boston, Philadelphia, Washington, Pittsburgh, Chicago, Milwaukee, Saint Paul, Minneapolis, Kansas City, Saint Louis, New Orleans, and other cities.
>
> "Prior to the prohibition of the sale of stout in this country, it was generally and habitually prescribed by a very large number of eminent and reputable physicians in the *bona fide* belief that it possessed curative powers, as well as health-giving and strength-producing properties. Complainant's predecessor in 1904, with no National Prohibition legislation then in view and for the purpose of securing data to be used in opposition to a proposed increase in the tariff on stout, sent out questionnaires to a large number of eminent and

reputable physicians of New York and elsewhere, fairly representative of the medical profession generally, asking them to state whether, in their judgment, Guinness's Stout possessed medicinal value, and if so, in what cases they prescribed it. Four hundred thirty-five (435) replies were received from which it appeared that 96 did not prescribe stout as a medicine, and 339, or 78 per cent., stated that in their judgment stout possessed valuable medicinal qualities, and that they habitually prescribed it for their patients, designating the cases in which they felt it was a proper and useful medicine. Complainant alleges, upon information and belief, that the foregoing is fairly typical of views entertained by physicians as to the medicinal value of Guinness's Stout.

"Standard works on the practice of medicine regard stout as possessing medicinal qualities and recommend its use as a curative agent in many cases of disease and ill health."

It further alleged (R. 2) that complainant and its predecessor had been engaged for seventy years prior to the war restrictions imposed by the Government of the United States, in the importation, sale and distribution of Guinness's Stout, its annual gross sales amounting to from $500,000 to $700,000, and yielding large profits, and that at the time of the passage of the National Prohibition Act it had on hand as a part of its stock in trade a large amount of Guinness's Stout, of the fair value of $35,000, theretofore lawfully acquired and lawfully held, upon which all taxes had been duly paid, and complainant, relying upon the permission contained in said Act to sell intoxicating liquor for medicinal purposes, made no attempt to export its stock on hand, since that would have involved serious financial loss. In October, 1921, the Treasury Department prepared and promulgated regulations under the National Prohibition

Act which permitted the sale of Guinness's Stout for medicinal purposes, but in view of the anticipated passage of said Willis-Campbell Act, which was afterward passed and approved November 23, 1921, the prohibition enforcement officers in New York refused to issue to complainant such a permit, notwithstanding the fact that on November 5, 1921, the Federal Prohibition Commissioner had expressly authorized the issue of such a permit to the complainant. The defendants claim that the above-quoted provision of the Willis-Campbell Act and the said regulations are valid, and based thereon, they have refused, and still refuse, to issue to complainant a permit to sell its stout for medicinal purposes, and they likewise refuse to issue to pharmacists permits to purchase such stout, and also to physicians to prescribe the same for medicinal purposes. They threaten to arrest and prosecute complainant's agents, servants and employees if it undertakes to sell stout for medicinal purposes, involving the imposition of severe penalties, including fines, imprisonment and forfeiture of property, and in the same manner to prosecute pharmacists if they purchase stout for medicinal purposes, and physicians if they prescribe the same for medicinal purposes. The penalties imposed by said Acts for the violation thereof are so large and severe as to deter complainant from asserting its rights except through the aid of a court of equity. The laws of the State of New York, where complainant's business is located, permit the sale of its stout for medicinal purposes. Complainant's right to sell for medicinal purposes its stock on hand, as well as its right to continue to import and sell Guinness's Stout for medicinal purposes will be lost, to its irreparable damage, unless relief be granted.

It is further alleged (R. 4) that the Willis-Campbell Act is unconstitutional and void for the reasons above

stated, for the reason that it amounts to a taking of complainant's property without due process of law, and for the further reason that the prohibition of the sale and use of complainant's stout for medicinal purposes, while at the same time permitting the sale of all vinous and spirituous liquor for such purposes, although containing a larger alcoholic content and much more likely to be used for beverage purposes, is so arbitrary and unreasonable as to amount to unlawful discrimination; that the regulations of the Commissioner of Internal Revenue for the enforcement of the Willis-Campbell Act, in the respects above stated, are null and void, for the same reasons. An appropriate injunction is asked for.

The defendants filed their motion to dismiss the bill of complaint (R. 7). This motion was sustained by the lower court, and the bill dismissed for want of equity (R. 10). The court filed a brief memorandum (R. 9), following the opinion in *Piel Bros.* v. *Day*, 278 Fed. 223. The case comes here upon direct appeal, under Section 238 of the Judicial Code.

Specification of Errors.

1. The Court erred in dismissing the bill of complaint herein.

2. The Court erred in holding that the Act of Congress, approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, was duly passed in the lawful exercise of constitutional authority in so far as it purports to prohibit the prescription and use of malt liquors, including Guinness's Stout, for medicinal purposes.

3. The Court erred in failing and refusing to hold that the said Act of Congress is unconstitutional and void in the particular above stated because in excess of the constitutional power of Congress to enact the same.

4. The Court erred in holding that Congress, under the Eighteenth Amendment to the Constitution of the United States, possesses the lawful power to prohibit the use of malt liquors, including Guinness's Stout, for medicinal purposes.

5. The Court erred in failing and refusing to hold that the regulation of the use of malt liquors, including Guinness's Stout, for medicinal purposes is exclusively within the control of the several States.

6. The Court erred in holding that it is within the power of Congress by legislative fiat to declare that malt liquors, including Guinness's Stout, have no therapeutic or medicinal value, and that such declaration is binding upon the courts of the United States.

7. The Court erred in failing and refusing to hold that the question whether malt liquors, including Guinness's Stout, possess a therapeutic or medicinal value is a judicial question, to be determined by the courts.

BRIEF.

I.

It is alleged in paragraph VI of the bill that Guinness' Stout is a valuable medicinal agent, and this allegation is to be taken as true, for the purposes of this appeal, notwithstanding the provisions of the Willis-Campbell Act.

It is a well-settled rule of practice that "a motion to dismiss like a demurrer admits the truth of the allegations of fact in the bill (*Foster, Federal Practice*, 6th Ed., Section 366). The rule is thus stated in *Detroit United Ry.* v. *City of Detroit*, 248 U. S. 429, 541:

> The question upon this appeal is: Did the bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court (in dismissing the bill) was equivalent to sustaining a demurrer to the bill.

The same question is presented here. Did the bill of complaint, taking its allegations to be true, including the allegations in paragraph VI, state grounds for relief to which the complainant was entitled upon the facts set forth? The action of the lower court in sustaining the motion to dismiss must stand or fall upon the averments of the bill, unaided by the allegations of the answer (*U. S.* v. *Ry. Employes' Dept.*, 286 Fed. 288; *Krouse* v. *Brevard Tannin Co.*, 249 Fed. 538; *Stromberg* v. *Holley*, 260 Fed. 220).

In paragraph VI, quoted in the foregoing statement, it is averred that Guinness's Stout is a valuable medi-

cinal agent in certain enumerated maladies; that its use generally is largely and predominantly for medicinal purposes, and that, prior to wartime restrictions upon its sale, its use in this country for beverage purposes was slight and negligible in comparison with its larger use as a medicine and for general non-beverage purposes; that over fifty per cent. of complainant's sales were to wholesale druggists and grocers throughout the country; that out of 435 questionnaires sent out in 1904 to reputable and representative members of the medical profession, 78 per cent. stated that, in their judgment, stout possessed valuable medicinal qualities, and that they habitually prescribed it for their patients in certain designated cases; that this is believed to be fairly typical of the views entertained by physicians as to the medicinal value of Guinness's Stout; and that standard works on the practice of medicine regard stout as possessing medicinal qualities and recommend its use as a curative agent in many cases of disease and ill health.

The case in this court, therefore, is one where it stands admitted that stout is a valuable therapeutic agent, and that its predominant use is for medicinal purposes. How, then, can Congress, acting under a constitutional grant of authority to prohibit the manufacture and sale of intoxicating liquor for *beverage* purposes, prohibit the sale of a recognized medicinal agent for medicinal purposes?

The National Prohibition Act itself recognizes the value of malt as well as other liquor for medicinal purposes, and contains carefully drawn provisions which permit the use of intoxicants for medicinal purposes. By Section 6 of Title II, a physician is required to procure a permit before he is permitted to prescribe any liquor, which by definition includes "malt or fermented liquor, liquids, and compounds." By Section 7, he may not prescribe liquor unless after a careful physical exam-

ination he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him for some known ailment. No more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once. He is required to keep a complete prescription record. By Section 8, a physician is required to use printed blanks furnished by the Commissioner, which shall be numbered consecutively. The books containing the prescription stubs shall be returned to the Commissioner when the prescription blanks have been used, and all unused or mutilated blanks shall be returned with the book. By Section 9, his permit may be revoked for cause. Provision is made by Section 6 for the purchase and sale of liquor for medicinal purposes upon obtaining a permit for that purpose.

The sale and use of sacramental wines, the use of liquor in hospitals and sanitariums, and the use of industrial alcohol are also permitted. A great number of regulations have been made by the Commissioner, with the approval of the Treasury Department, throwing safeguards and restrictions around the sale and prescription of intoxicating liquor for medicinal purposes. Progressively severe penalties are provided by Section 29 for a violation of the Act, or for a violation of the numerous regulations, and of the provisions of any permit.

So the law stood until the passage of the Willis-Campbell Act, which permits the use of spirituous and vinuous liquor for medicinal purposes, but declares void all permits to prescribe and prescriptions for any other liquor. Following the passage of this Act and the adoption of the regulations for its enforcement, it became a penal offense to sell or purchase stout for medicinal purposes, and likewise a penal offense for a physician to prescribe stout for his patients.

It is to be noted that the Willis-Campbell Act does not contain a finding or declaration that stout, or any other malt liquor, is not a legitimate therapeutic agent; it merely prohibits its use as such. But it may be argued that Congress may be said to have reached this conclusion by implication, even though it is not expressly so stated in the Act. Even if this be admitted, for the sake of the argument, it is obvious that no declaration which Congress might make upon the subject is conclusive in this proceeding. Whether or not stout has value as a medicine is a question of fact, subject to judicial determination, and wholly beyond the control of legislative fiat.

The Eighteenth Amendment did not clothe Congress with the general power to invade the domain of medical authority, or to substitute its judgment for the judgment of the attending physician. Much less may it select a recognized therapeutic agent, such as Guinness's Stout, and declare that it may not be prescribed for a patient, even though the attending physician regards it as essential or indispensable in bringing about a restoration to health. If Congress can select one recognized medical agent, and lawfully prohibit its use, there is no limit to which it may not go. If it should continue its activities in this behalf, the medical profession of the country might soon find the remedies available for its continued warfare against disease sadly reduced in number. If Congress can place a legislative ban upon the use by physicians of recognized therapeutic agents, it can, by a parity of reasoning, make the use and prescription of certain specified remedies compulsory. The medical profession might thereby be wholly stripped of its authority. The treatment of disease would become standardized. There would be one, or possibly more than one, remedy for each known disease, and this would be ad-

ministered to rich and poor alike, without "any undue or unreasonable preference or advantage to any particular person," and without any "unjust discrimination," to quote the familiar language of the Interstate Commerce Act. The surgical profession might also be standardized. Certain operations might be prohibited, and others made compulsory, if Congress, in its wisdom, should so determine.

But the Eighteenth Amendment furnishes no justification for the assumption by Congress of control over the functions of the medical profession; nor does it empower Congress to declare by legislative enactment that an admitted therapeutic agent, recognized as such by the medical profession and employed by it in its battle with disease, shall be outlawed.

In two recent cases it has been held that it is not within the power of Congress to limit the amount of alcohol a physician may prescribe for his patient to a quantity not exceeding one-half pint within any period of ten days, as is attempted to be done in the National Prohibition Act. In *United States* v. *Freund,* 290 Fed. 411, the court, in speaking of this limitation, said:

> So, too, they purport to determine the dosage of alcohol a physician may prescribe, and from him any patient shall receive, viz., not to exceed one-half pint for use within any period of 10 days. If therapeutics were an exact science, if diseases and their courses were of determined diagnosis and invariable prognosis, if patients were constituted alike and affected alike, if remedies could be admeasured by fixed rule, this provision would be valid. But since in respect to all these factors the truth is otherwise, every patient presenting to the physician a different problem for solution, this provision of the statute is invalid.
>
> It is an extravagant and unreasonable attempt to subordinate the judgment of the attending

> physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice.

In the other case, *Lambert* v. *Yellowley*, 291 Fed. 640, the court said:

> If this be true, it would seem not to be a function of the Congress, particularly under the amendment, to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy.
>
> Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable necessities of the proper treatment of known ailments.

It is a rule of general application that the determination of questions of fact is a judicial and not a legisla-

tive question. As an illustration, the Constitution has entrusted the control over interstate commerce to Congress, and likewise the control of intrastate commerce to the several States. It is a familiar rule that it is for the courts to say what constitutes commerce of each class, and that it is wholly beyond the power of Congress to declare by legislative enactment that a given state of facts shall constitute intrastate commerce or interstate commerce, as the case may be. Such a declaration would not be accepted by the courts. So, in like manner, it is not within the competency of Congress to declare that stout is not a medicinal agent—that is for the courts to determine. The general rule is thus stated in *Block* v. *Hirsch,* 256 U. S. 136, 65 L. ed. 865:

> No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts.

Other cases stating the rule in its application to various situations are as follows:

In *Shoemaker* v. *United States,* 147 U. S. 282, 37 L. ed. 170, the court said:

> The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

In *Producers Transportation Co.* v. *Railroad Comm.,* 251 U. S. 228, 64 L. ed. 239, the court said:

It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment. Chicago, B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 595, 59 L. ed. 735, 741, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Associated Oil Co. *v.* Railroad Commission, 176 Cal. 518, 523, 526, L. R. A. 1918C, 849, P. U. R. 1918B, 633, 169 Pac. 62. And see Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84; Louisville & N. R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 495, 49 L. ed. 1135, 1139, 25 Sup. Ct. Rep. 745; Weems S. B. Co. *v.* People's S. B. Co., 214 U. S. 345, 357, 53 L. ed. 1024, 1029, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Chicago & N. W. R. Co. *v.* Ochs, 249 U. S. 416, 419, 420, 63 L. ed. 679, 682, 683, P. U. R. 1919D, 498, 39 Sup. Ct. Rep. 343.

In *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, the said court (p. 327):

By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question is judi-

> cial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, and the ascertainment of that is a judicial inquiry.

We earnestly contend, therefore, that the medicinal value of stout as set forth in paragraph VI of complainant's bill, is to be taken as true, for the purpose of this appeal, and that a contrary finding by Congress, if there be one in the Willis-Campbell Act, which we do not admit, in no wise limits or affects this contention. Taking the conceded therapeutic value of stout as a premise, we proceed, in the following pages, to demonstrate, as we believe, that the attempt of Congress in the Willis-Campbell Act to prohibit its sale and use for medicinal purposes was wholly beyond the power of Congress under the Eighteenth Amendment.

II.

The grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Congress and State legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the legislatures of the several States retaining exclusive legislative power over intoxicating liquor for non-beverage purposes.

Prior to the Eighteenth Amendment, the regulation of the manufacture and sale of intoxicating liquors was a function of State government. The legislative power

of the States was plenary, and extended to every conceivable form of regulation or prohibition, according to the public policy of each individual State. Congress possessed only the power to regulate the interstate transportation of intoxicating liquors, and even this power had been limited and restricted by the Wilson Act and the Webb-Kenyon Act, which to a corresponding extent increased the legislative authority of the States.

This was the situation to which the Eighteenth Amendment was intended to apply. A re-arrangement of power as between national and state governments over the subject of intoxicating liquor was thereby effected. The manufacture, sale or transportation of intoxicating liquors "for beverage purposes" was prohibited, and Congress and the several States were vested with concurrent power to give effect to this prohibition. Power to regulate or prohibit the sale of intoxicating liquor for non-beverage purposes had always been vested in the legislative authority of the several States, and no attempt was made to transfer or vest this power in the national government. It remained, therefore, undisturbed in the several States. This is the necessary effect of the Tenth Amendment, which reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.

A comprehensive statement of the effect of the Eighteenth Amendment in making a separation of State and Federal power over intoxicating liquor and defining its limitations is contained in the recent case of *United States* v. *Lanza*, 43 Sup. Ct. 141:

> The Amendment was adopted for the purpose of establishing prohibition as a national policy

reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with

> it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigilotti* v. *Pennsylvania* (April 10, 1922).
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It is always to be borne in mind that by the express language of the Eighteenth Amendment the control over intoxicating liquor conferred on Congress is limited to "beverage purposes." The necessary effect of the Tenth Amendment is to reserve to the several States all power over intoxicating liquor for "non-beverage purposes", and this power is exclusive; the States, and the States alone, may exercise it. It is reserved to the several States to determine whether stout may be sold and used for medicinal purposes. Congress is without any direct legislative power whatsoever over the subject matter.

It is true that Congress in the exercise of a delegated power, such as the power to prohibit the use of intoxicating liquor for beverage purposes, possesses the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale or transportation of intoxicating liquor for the prohibited purposes; but the exercise of this incidental power, it is respectfully contended, must stop short of

the actual prohibition of the manufacture and sale of intoxicating liquor for non-beverage purposes. Otherwise the legislative control of the several States over intoxicating liquor for non-beverage purposes, reserved to them by the Tenth Amendment, would be nullified and set at naught.

The incidental power of Congress to give full effect to a delegated power cannot, consistently with the Tenth Amendment, wholly deprive the States of the power which that amendment reserves to them. In other words, judicial construction cannot write into the Eighteenth Amendment authority to prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes, as well as for beverage purposes. To do so would be to strike the words "for beverage purposes" from the Amendment. Had the amendment when submitted to the legislatures of the several States contained a delegation of authority to Congress to prohibit the manufacture, sale or transportation of intoxicating liquor for non-beverage, as well as beverage purposes, there is no reason to suppose that it would have received the ratification it did.

It is of the utmost importance to bear in mind that the power over the manufacture and sale of intoxicating liquor, similar to the power to regulate state and interstate commerce, is a *divided* power, a part of this power being vested in the general government and a part being reserved to State governments. The State powers may not encroach upon the power of Congress, nor may the power of Congress encroach upon the State power to the extent of occupying the entire legislative field. The Constitution itself creates a dividing line which neither may cross.

It should also be borne in mind that this is not a case where Congress acts in the exercise of a power covering the entire legislative field, as it did in *Ruppert*

v. *Caffey*, 251 U. S. 264. There Congress was acting in the exercise of its constitutional war power, and its authority, therefore, covered the entire field, and extended to the prohibition of intoxicating liquor, whether for beverage or non-beverage purposes. Nor is it like the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, where an act of the legislature of Mississippi prohibiting the sale of malt liquors was upheld. There the State authority was exclusive, covering the entire legislative field, and it could regulate or prohibit as its public policy might require. In neither case was there any constitutional division of power between National and State governments.

It may be contended by the defendants that the incidental power of Congress to carry out and give effect to its power to prohibit the sale of intoxicating liquor for beverage purposes, authorizes it to prohibit absolutely the sale of such liquor for medicinal purposes. We confidently deny this proposition, and state our position and our reasons for it under the following heading.

III.

The incidental power possessed by Congress to make effective its power to prohibit the sale of intoxicating liquor for beverage purposes, cannot be constitutionally exercised so as wholly to prohibit its sale for non-beverage purposes.

The power of Congress to prohibit the sale of intoxicating liquor for beverage purposes, and its incidental power to enact such legislation as may be reasonably calculated to make this power effective, is freely conceded.

Congress may throw safeguards around the sale of liquor for non-beverage purposes so as to prevent its sale for beverage purposes. It may lawfully require dealers in liquor for non-beverage purposes to take out permits and to have all of their sales policed. It may impose reasonable limits upon the quantity of intoxicating liquor to be sold for non-beverage purposes. It may reasonably limit the number of prescriptions for medicinal liquor which may be issued by a physician, or it may, if deemed necessary, limit the issue of prescriptions to designated State or Federal officials.

It is confidently submitted, however, that Congress may not, as is attempted in the Willis-Campbell Act, wholly usurp the conceded legislative function of the States, and altogether prohibit the sale of intoxicating liquor for non-beverage purposes. Reasonable regulations must stop short of absolute prohibition. State legislative power may be infringed upon or incidentally affected, but it can not be entirely appropriated. The words "for beverage purposes" in the Eighteenth Amendment cannot be amended by judicial construction so as to read "for both beverage and non-beverage purposes." The Tenth Amendment stands as an insurmountable barrier against any such attempt. It reads into the Eighteenth Amendment a condition, the substance of which may be expressed as follows:

> Provided, however, that the exclusive right to regulate or prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes is hereby reserved to the several States.

There are well-recognized limitations upon the incidental power of Congress to make effective the exercise of its authority under an express or delegated power. Some of the decisions defining these limitations will now be referred to.

The power of Congress over interstate commerce is paramount, and it possesses the incidental power to enact such legislation as to make this power fully effective. Congress sought to invoke this incidental power for the laudable purpose of *prohibiting* the employment of children in mines or factories, and accordingly, on September 1, 1916, passed an act prohibiting the transportation in interstate commerce of the products of mines or factories in which, within thirty days prior to removal, children under the age of 14 years were employed, or children between the ages of 14 and 16 were employed or permitted to work more than eight hours a day or more than six days a week. The Act, however, was held to be invalid (*Hammer* v. *Dagenhart*, 247 U. S. 251), upon the ground that the incidental power of Congress, thus invoked, could not constitutionally extend to control a subject within the exclusive power of the States. The court said:

> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.
>
> Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in United States *v.* De Witt, 9 Wall. 41, 45, 19 L. ed. 593, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occa-

sions, that we think it unnecessary to enter again upon the discussion." See Keller *v.* United States, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.), p. 11.

* * * * * * *

A statute must be judged by its natural and reasonable effect. Collins *v.* New Hampshire, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 43 L. ed. 60. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. Pipe Line case, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. ed. 1459. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. Lane County *v.* Oregon, 7 Wall. 71 76, 19 L. ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general Government. New York *v.* Miln, 11 Pet. 102, 139, 9 L. ed. 394; Kidd *v.* Pearson, *supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

* * * * * * *

> In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

It thus appears that the incidental power of Congress to make effective its general power over interstate commerce is not without its limitations, and that it must stop short of overriding the Tenth Amendment and usurping the powers which that amendment has reserved to the States and to the people.

But the advocates of the Child Labor Law were undismayed by the failure of their efforts to invoke the power of Congress over interstate commerce, and they sought to accomplish the same result by resort to the power of Congress over taxation. The Child Labor Tax Law of February 24, 1919, was the result. It imposed a tax of 10 per cent of the net profits of the year upon an employer who knowingly employed during any portion of the year a child within the age limits therein prescribed. The end sought was to *prohibit* child labor. Here, again, the incidental power of Congress to make

effective its power of taxation was relied upon, but it was held (*Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817), that the Act of Congress was void, in that it was an unconstitutional effort to employ the power of taxation to regulate a subject matter which, under the Tenth Amendment, is exclusively a State function. The court there said:

> Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? * * * In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?
>
> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

The court then refers to the case of *Hammer* v. *Dagenhart, supra,* saying:

Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority."

In the case at bar, Congress, in the name of a tax which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

The analogy of the Dagenhart Case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the Dagenhart Case, the application of the principle announced by Chief Justice Marshall in M'Culloch *v.* Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605, in a much-quoted passage:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Another recent successful invocation of the Tenth Amendment against the incidental power of Congress to make effective both the interstate commerce and taxation features of the Constitution is found in the decision of this Court in *Hill* v. *Wallace*, 259 U. S. 44, 75, declaring the Future Trading Act of August 24, 1921, unconstitutional and void. This Act contained a complete regulation of boards of trade, with a so-called tax of 10 cents a bushel on all contracts for the sale of grain for future delivery, imposed by way of penalty to coerce boards of trade and their members into compliance. The court held that the Act was not a lawful exercise by Congress of its power over interstate commerce, or of its power over taxation, but was an unauthorized attempt to regulate the conduct of boards of trade, which was a subject matter over which the States had exclusive jurisdiction. The court said:

> The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all "futures" to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery

for hearings by the Secretary of Agriculture and by the commission of violations of these regulations, with the withdrawal by the commission of the designation of the board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

Our decision, just announced, in Bailey *v.* Drexel Furniture Co., 259 U. S. 20, *ante*, 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449, involving the constitutional validity of the Child Labor Law, completely covers this case. We there distinguish between cases like Veazie Bank *v.* Fenno, 8 Wall. 553, 19 L. ed. 482, and McCray *v.* United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation. We there say:

"Out of proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with,

and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject, and enforce it by a so-called tax upon departure from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress, and completely wipe out the sovereignty of the states."

This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing cannot be sustained as an exercise of the taxing power of Congress conferred by sec. 8, article 1.

We come to the question, then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the state. House *v.* Mayes, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234; Broadnax *v.* Missouri, 219 U. S. 287, 55 L. ed. 219, 31 Sup. Ct. Rep. 238. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act, from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the city of Chicago, for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from the evidence before it, to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its

> power under the commerce clause in mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

The bearing of these decisions upon the case at bar is obvious. They hold that manufacturing and mining and the employment of child labor or other labor therein, the conduct of boards of trade and the carrying on of business thereat, are within the exclusive police power of the States, reserved to them under the Tenth Amendment. These powers cannot be successfully invaded or usurped by Congress through the exercise of its power over interstate commerce or over taxation, nor under the implied powers which Congress possesses to enact legislation to make these powers effective. So it is with the sale of intoxicating liquor for non-beverage purposes. The right to control this subject matter has been exclusively reserved to the several States. While it may be incidentally affected by proper Congressional action, it cannot be wholly destroyed. It is obvious that the exclusive authority of the several States over intoxicating liquor for medicinal purposes, or liquor for sacramental or other non-beverage purposes, can not be controlled indirectly through the imposition of a prohibitive tax upon dealers in such non-beverage liquor, or on physicians who prescribe it. If such control can not be exercised indirectly, by what process of reasoning can its direct exercise, as attempted in the Willis-Campbell Act, be justified?

The Federal Constitution draws a line of demarcation between the control of interstate commerce by Congress and the control of intrastate commerce by the several States, each of which is supreme within its sphere of legislative action. Congress can no more strike down or prohibit intrastate commerce than the States can invali-

date congressional regulation of interstate commerce. The Constitution has drawn a similar line of demarcation between the power of Congress over liquor for beverage purposes, and the power of the States over liquor for non-beverage purposes. Neither government can successfully invade the legislative domain of the other.

These observations find ample support in the first Employers Liability case (*Howard* v. *Illinois Central*, 207 U. S. 462), where the court held invalid an Act of Congress applying to all employees of carriers engaged in interstate commerce, for the reason that Congress had no power to legislate with reference to employees who were engaged in strictly intrastate commerce. The court said:

> The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact no interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of

its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

It was sought to sustain the constitutionality of the Act by contending that a carrier by engaging in interstate commerce thereby submitted itself to the regulatory power of Congress, and that this included the power to regulate the liability of the carrier to its employees, although such employee was engaged in intrastate commerce. This contention was denied by the court, using the following language:

It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve,

> since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.

The Tenth Amendment, which, we contend, reserves to the several States the power to regulate or prohibit the sale of intoxicating liquor for non-beverage purposes, is a limitation imposed by the Constitution upon the action of Congress, and this limitation should receive a liberal, and not a narrow construction. In support of this rule we invoke the decision of this court in *Fairbank* v. *United States,* 181 U. S. 283. There the validity of the stamp tax imposed on foreign bills of lading by Act of Congress was under consideration. Section 8, Article 1, of the Constitution gave Congress power "to lay and collect taxes, duties, imposts and excises." One of the limitations contained in the Constitution was that "no tax or duty shall be laid on any articles exported from any State." The court held that the limitation must be liberally construed, and that its effect was to deprive Congress of the power to impose the tax in question. It said:

> We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule

and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition of limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

* * * * * *

The requirement of the Constitution is that exports should be free from any governmental burden. The language is, "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter,

destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading of goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purpose of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

It is pointed out that if the first clause of sec. 8 of art. 1 were the only constitutional provision upon the subject, no doubt would be entertained that the act of Congress in question would be upheld, saying (pp. 295, 296):

> The first clause of sec. 8 of article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts, and excises." Were this the only constitutional provision in respect to the matter of taxation, there would be no doubt that, tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500:
>
> "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

The court then refers to *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, saying (p. 300):

> In Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, it appeared that Congress had passed an act authorizing the condemnation of a lock and dam known as the upper lock and dam on the Monongahela river, belonging to the navigation company, with a proviso "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated;" the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the 5th Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived; * * *.
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> In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify, or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

The court next cites *Boyd* v. *United States,* 116 U. S. 616, saying (p. 301, 302):

> In Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, the 5th section of the act of June 22, 1874 (18 Stat. at L. 186, chap. 391), which authorized a court of the United States in revenue cases, on motion of the district attorney, to require the defendant or the claimant to produce in court his private books, invoices, and papers, or else that the allegations of the attorney as to their contents should be taken as confessed,

> was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the 4th and 5th Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those Amendments; * * *

It is next pointed out by the court that the construction which Congress had placed upon these constitutional provisions in enacting revenue statutes in the past was of no consequence where the language was plain, since the construction of constitutional provisions is not for Congress but for the courts, saying:

> From this *resumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.
>
> We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the re-

> cent statute of 1898. It must be borne in mind also in respect to this matter, that during the first period exports were limited and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war, or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

The incidental power of Congress to enact legislation to make effective the exercise of its power over interstate commerce must be reasonably exercised, and does not extend to matters having no direct or immediate connection with such commerce. Thus, in *Adair* v. *United States*, 208 U. S. 161, it was held that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by the Act of June 1, 1898, sec. 10, to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership in a labor organization. The court said:

> Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor or-

ganizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is not such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ, in the conduct of its interstate business, *only* members of labor organizations, or *only* those who are *not* members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right se-

> cured by other provisions of the Constitution. Gibbons *v.* Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Lottery Case (Champion *v.* Ames), 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321.
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> It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair.

Much less can an incidental or implied power of Congress be extended to and exerted upon a subject matter which has been placed by the Constitution in the exclusive control of the legislative power of the several States.

Another case where an unsuccessful effort was made to extend the incidental power of Congress over a subject matter within the exclusive jurisdiction of the States is *United States* v. *De Witt,* 9 Wall. 41. There the court held invalid the Act of Congress of March 2, 1867, which made it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at a less temperature than 110 degrees Fahrenheit. It was sought to sustain the Act on the ground that it was "in aid and support of the internal revenue tax imposed on other illuminating oils." The court said:

> That Congress has power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the states has al-

ways been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils, the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an Act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress may be inferred from the circumstances, that while all special taxes on illuminating oils were repealed by the Act of July

20, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License Cases, 5 How. 504; Passenger cases, 7 How. 282; License Tax cases, 5 Wall. 470 (72 U. S. XVIII, 500, and the cases cited) that we think it unnecessary to enter again upon the discussion.

In *Buffington* v. *Day,* 11 Wall. 113, it was sought to extend the taxing power of Congress to the imposition of a tax upon the salary of a judicial officer of a State. The effort, however, was unsuccessful, because, under the Tenth Amendment, "the state is as sovereign and independent as the general government." The court said:

It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be

> such as are expressly given, or given by necessary implication.
>
> The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.

In *Keller* v. *United States*, 213 U. S. 138, it was held that the Act of Congress of February 20, 1907, providing for the criminal punishment of the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman within three years after she shall have entered the United States, was unconstitutional and void. It was sought to sustain the Act as a part of "the general power which exists in the nation to control the coming in or removal of aliens." It was held, however, that the subject matter of the statute was a part of the reserved police power of the State, which could not be invaded by the incidental power of Congress which the Government had invoked. The court said (p. 144):

> It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow

her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.

The beneficent purposes to be accomplished by the Tenth Amendment, as well as the liberal construction which should be accorded to it, are forcefully expressed in *Kansas* v. *Colorado*, 206 U. S. 46, where it is said:

> This amendment, which was seemingly adopted with prescience of just such contentions as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that Act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we, the people of the United States," not the people of one state, but the people of all the states; and Article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the

> states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.

It remains to consider the limitations which the Tenth Amendment imposes upon the incidental power of Congress to enact legislation to carry into effect its delegated powers; or, as applied to this case, what are the limitations upon the power of Congress in making effective the prohibition of intoxicating liquor for beverage purposes? Certain it is that Congress may go no further than is reasonably necessary to put an end to traffic in intoxicating liquor for beverage purposes. It may adopt such safeguards as are reasonably necessary to prevent intoxicating liquor from coming into public use, for the prohibited purposes. To that extent, and to that extent only, may it encroach upon the reserved legislative powers of the several States. That this is the extreme limit to which Congress may go is apparent from a consideration of the recent case of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, where the court sustained the validity of an

order made by the Interstate Commerce Commission requiring intrastate rates to be raised to a level with new interstate rates promulgated by the Commission. It was pointed out that the Transportation Act placed the affirmative duty upon the Commission to establish rates which would yield to railway companies in the country a specified return, and that this mandate of Congress could not be made effective unless the intrastate rates should be raised to a corresponding level. The court held that commerce is a unit, and that when interstate and intrastate commerce are so mingled together that the supreme authority of the nation cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation may be exercised, and it is not an invasion of State authority. Even in such a case the State authority over intrastate rates can be only incidentally affected. It can not be nullified, nor abrogated, nor can Congress draw to itself control over that which the Constitution has left to the States. The court was careful to preserve to the States the "general regulation of intrastate commerce," saying:

> It is said that our conclusions gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Com-

mission has found to be fair to interstate commerce.

If the Willis-Campbell Act affected the sale of non-beverage liquor incidentally, and left to the States its "general regulation," we would have no ground for complaint. The National Prohibition Act went to the extreme limit in the so-called incidental regulation of non-beverage liquor. The Willis-Campbell Act, not content with the so-called incidental regulation contained in the former act, undertakes, in express terms, absolutely to prohibit the use of all malt liquors for non-beverage purposes, thus denying to the several States all power of "general regulation" of any kind whatsoever.

The effect of the Eighteenth and Tenth Amendments, considered together, is to vest in the several States the power to regulate or prohibit the use of malt liquors for non-beverage purposes. The effect of the Willis-Campbell Act, if valid, is to divest the States of every shred of authority over the subject. It is plain, therefore, that Congress has transcended its constitutional authority; it has passed the limit of incidental regulation and undertaken to usurp the rightful functions of the several States. The Supreme Court, in *Rhode Island* v. *Palmer*, 253 U. S. 350, recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement." Those limits have been clearly transgressed in the present instance.

IV.

The enforcement of the Willis-Campbell Act will deprive the appellant of its property without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment.

It is contended that the Willis-Campbell Act is invalidated by the Fifth Amendment, for two reasons: First, because the action of Congress in prohibiting the use of Guinness's Stout for medicinal purposes, while permitting the use for such purposes of all vinous and spirituous liquors, is arbitrary, capricious and unreasonable; and, secondly, because the National Prohibition Act, which permitted the use of Guinness's Stout for medicinal purposes, was declarative of a national policy to that effect, and amounted to an assurance to the complainant that its stock then on hand could thereafter lawfully be disposed of for that purpose, whereas the Willis-Campbell Act, subsequently passed, immediately prohibited the further sale and use of said stock, and thereby undertook to take or confiscate the appellant's property for public use without just compensation. These will be considered in their order.

The due process clause of the Fifth Amendment is given precisely the same construction as the due process clause of the Fourteenth Amendment. No precise definition of this phrase has been attempted by the courts; its application has been determined by a process of inclusion and exclusion.

The recent case of *Chicago & Northwestern Ry.* v. *Nye Schneider Fowler Co.*, 43 Sup. Ct. 55, gives a broad and comprehensive interpretation of the due process clause

and equal protection clause of the Fourteenth Amendment, holding that statutes which "violate the rudiments of fair play" or which "work an arbitrary, unequal and oppressive result which shocks the sense of fairness" are void. It is there said:

> But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. * * * The Court has not intended to establish one, but only to follow the general rule that when in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect to state legislation, they will not be sustained. * * * Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play.

In *Truax* v. *Corrigan,* 257 U. S. 312, 332, the court said (p. 332):

> The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit

> of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Hurtado *v.* California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. "All men are equal before the law;" "This is a government of laws, and not of men;" "No man is above the law,"—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

It has been held that the words "due process of law" and "law of the land" express the same thought and have the same meaning. In *Davidson* v. *New Orleans,* 96 U. S. 97, Mr. Justice Miller said:

> The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guaranties of the rights of the subject against the oppression of the crown.

And in *Missouri Pacific R. Co.* v. *Humes,* 115 U. S. 513, Mr. Justice Field said:

> In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.

Judge (afterward Justice) Jackson, in *Scott* v. *City of Toledo,* 36 Federal 385, 393, citing Cooley, Const. Lim. 432, said:

> In a general sense, "due process of law" is identical in meaning with the phrase, "law of the land," as used in the constitutions of the several states.

As above stated, the words "due process of law" must have the same meaning in the Fifth and Fourteenth Amendments. This has been so stated in *Hurtado* v. *California,* 110 U. S. 516. There the court had before it the question whether or not a statute of California, authorizing prosecutions for felonies by information, without indictment by a grand jury, was repugnant to the "due process" clause of the Fourteenth Amendment, and after comparing the two amendments, calling attention to the provision for indictment by a grand jury in the Fifth Amendment, said:

> The nature and obvious inference is that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irre-

> sistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of he states, it was used in the same sense with no greater extent.

This court has repeatedly been called upon to decide whether certain classifications in state statutes were reasonable or arbitrary, and whether they were in conflict with the Fourteenth Amendment. In *Caldwell* v. *Texas,* 137 U. S. 692, 697, the court had before it the validity of a state statute under this amendment, and it said:

> By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. 2 Kent, Comm. 13. And due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank of Columbia *v.* Okely, 4 Wheat. 235, 244.

In *Leeper* v. *Texas,* 139 U. S. 462, with the like question before it, the court said:

> It must be regarded as settled * * * that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured

> by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. Hurtado *v.* California, 110 U. S. 516, 535, and cases cited.

And in *Giozza* v. *Tiernan,* 148 U. S. 657, this court said again:

> Due Process of Law, within the meaning of the amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

McGehee on Due Process of Law, p. 60, says:

> Purely arbitrary decrees or enactments of the Legislature directed against individuals or classes are held not to be "the law of the land", or to conform to "due process of law."

And Willoughby on the Constitution, pp. 873, 874, says:

> The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far

as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike," and do not subject the individual to an arbitrary exercise of the powers of government.

The Willis-Campbell Act, therefore, under well-recognized rules of law, cannot subject the appellant to the operations of a statute which "violates the rudiments of fair play" or which in its result is "arbitrary, unequal or oppressive." The Act, we contend, violates this constitutional limitation. It arbitrarily and unreasonably singles out malt liquors and prohibits their use for medicinal purposes, while, at the same time, expressly authorizing the use for such purposes of the innumerable forms of vinous and spiritous liquors of greater alcoholic content and offering much greater facility for illegal sale and distribution for beverage purposes. To be valid, this discrimination against malt liquors must rest upon some reasonable relation to the object sought to be accomplished, which is prohibition of the manufacture and sale of *all* intoxicating liquors for beverage purposes. If vinous and spiritous liquors may be used for non-beverage purposes, no reason is perceived why the same rule should not be applied to malt liquors.

Secondly, it is contended that the Willis-Campbell Act, if valid, takes the appellant's property for public use without just compensation. This contention is based upon the following considerations. At the time of the passage of the National Prohibition Act, which permitted the sale of malt liquors for medicinal purposes, the appellant had on hand a large stock of Guinness's Stout. The Act itself was assumed to be declarative of the permanent public policy of the Government under the

Eighteenth Amendment. That Amendment, this court has said, created a revolution in our national attitude toward intoxicating beverages, and the terms of the revolution were assumed to be expressed in the Act. Appellant therefore felt, and, we submit, was justified in feeling, that, consistently with the newly declared public policy, it would be permitted to dispose of its property for medicinal use, and it was taking steps to do so when the Willis-Campbell Act was passed. That Act made no provision for compensating the appellant for the loss which it would sustain from its enforcement, nor did it postpone the effective date of the Act for a period during which the appellant might dispose of its stock. Immediately upon its passage it was approved, and at once became effective.

The appellant contends that the immediate prohibition of the sale of Guinness's Stout, under the circumstances recited above, can be legally effected only provided compensation is made. This question, as is stated in *Ruppert* v. *Caffey*, 251 U. S. 264, was at that time an open one, on which the court had expressed no opinion. It is, however, there intimated that a State enactment of this character had been sustained in *Mugler* v. *Kansas*, 123 U. S. 623, 637. In that case, however, a constitutional amendment had been adopted, effective November 2, 1880, and the act under consideration was approved February 19, 1881, to take effect May 1, 1881. The constitutional amendment was a warning, and six months intervened in which the interested parties could set their house in order. No opportunity of this nature was afforded the appellant after the passage of the Willis-Campbell Act, nor did it receive any previous warning.

It was further claimed by the complainant in *Ruppert* v. *Caffey, supra*, that the act there under consideration was particularly oppressive in respect to beer on hand

at the time it took effect, because the complainant was engaged in manufacturing and selling non-intoxicating beverages expressly authorized by the President in his proclamation of December 8, 1917. The claim was denied, on the ground that no express authorization by the President had been shown.

In the case at bar, however, it can not be denied that the National Prohibition Act permitted the sale by the appellant of its Guinness's Stout for medicinal purposes, and that the Willis-Campbell Act became effective immediately upon its passage and approval, and thereby made illegal what the prior Act had permitted and made lawful. This, we contend, amounts to a taking of appellant's property for public use without just compensation.

For the foregoing reasons we earnestly contend that the lower court erred in dismissing the complainant's bill and that its decree should be reversed.

Respectfully submitted,

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25 Broad St.,
New York, N. Y.,

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